

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of )  
 )  
OKLAHOMA WESTERN TELEPHONE )  
COMPANY, INC. )  
 )  
Request for Permanent Waiver of Commission )  
Rules Regarding Transition of Broadband Radio )  
Service and Educational Broadband Service to )  
Revised Band Plan )  
 )

**MEMORANDUM OPINION AND ORDER**

**Adopted: May 28, 2010**

**Released: June 1, 2010**

By the Associate Chief, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. In this *Memorandum Opinion and Order*, we grant a request filed by Oklahoma Western Telephone Company, Inc. (Oklahoma Western) to opt out of the transition to the Commission's new technical rules governing Broadband Radio Service (BRS) in the 2590-2600 MHz band. In light of this decision, we also provide Clearwire Corporation (Clearwire) with 30 days from release of this order to elect whether to transition certain stations not covered by the opt-out waiver.

**II. BACKGROUND**

2. On July 29, 2004, the Commission released a *Report and Order and Further Notice of Proposed Rulemaking (BRS/EBS R&O)* that transformed the rules and policies governing the licensing of services in the 2500-2690 MHz band.<sup>1</sup> Prior to the *BRS/EBS R&O*, the technical rules and band plan for the 2500-2690 MHz band were designed primarily to promote wireless cable and educational television services, which resulted in licensees receiving interleaved channel groups instead of contiguous channel blocks.<sup>2</sup> In most areas of the country, however, the deployment of wireless cable was not successful.

<sup>1</sup> See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 03-66, 19 FCC Rcd 14165 (2004) (*BRS/EBS R&O* and *FNPRM* as appropriate).

<sup>2</sup> In the EBS and BRS services, channels are usually licensed in groups of four. When EBS was created, EBS reception equipment could not receive adjacent channels without interference. Thus, the Commission interleaved the A block channels with the B block channels, the C block channels with the D block channels, the E block channels with the F block channels and the G block channels with the H block channels. See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, WT Docket No. 03-66, 18 FCC Rcd 6722, 6744 ¶ 47 (2003) (*NPRM*).

3. Consequently, in the *BRS/EBS R&O*, the Commission developed a new band plan and technical rules that permit a range of new and innovative wireless services in the 2500-2690 MHz band and give licensees contiguous channel blocks.<sup>3</sup> The new band plan consists of two low-power segments, the Lower Band Segment (LBS) and the Upper Band Segment (UBS), and a high-power segment, the Middle Band Segment (MBS).<sup>4</sup> The channel configuration and the technical rules for the LBS and UBS are designed to permit a range of wireless services.<sup>5</sup> The MBS, in contrast, consists of seven high-power channels and is designed for the transmission of video programming, for those licensees that still wish to provide such programming.<sup>6</sup> The *BRS/EBS R&O* further established a plan to transition EBS and BRS licensees from their interleaved channel locations to their new channel locations in the LBS, UBS, or MBS.<sup>7</sup> Not all licensees, however, are required to transition to the new band plan and technical rules. The *BRS/EBS R&O* permitted a limited number of Multichannel Video Programming Distributors (MVPDs) to seek a waiver from the Commission to “opt out” of the transition, thus permitting them to continue their high-power, high-site operations throughout the entire 2500-2690 MHz band.<sup>8</sup> On April 27, 2006, the Commission released the *Third Memorandum Opinion and Order and Second Report and Order (3rd MO&O)*, in which it affirmed its decision to consider these waivers on a case-by-case basis.<sup>9</sup>

4. Oklahoma Western holds four BRS station licenses in the Clayton, Oklahoma Geographic Service Area (GSA), and has been offering wireless cable service in the rural areas surrounding Clayton since 1990.<sup>10</sup> Oklahoma Western spent approximately \$450,000 developing its system and has spent hundreds of thousands of dollars operating and maintaining the system.<sup>11</sup> The system provides seven over-the-air television signals to 125 customers for \$13.75 a month.<sup>12</sup> With the exception of a few marginally viewable over-the-air television signals, broadcast television service is largely unavailable in Oklahoma Western’s GSA.<sup>13</sup> Oklahoma Western’s system provides broadcast television stations to sparsely populated rural areas that remain unserved by other facilities capable of providing video services.<sup>14</sup> Oklahoma Western states that the county it services has a high poverty rate

<sup>3</sup> See *BRS/EBS R&O*, 19 FCC Rcd at 14168 ¶ 4.

<sup>4</sup> *Id.* at 14169 ¶ 6.

<sup>5</sup> *Id.* at 14168 ¶ 4.

<sup>6</sup> *Id.* at 14185-14186 ¶ 4.

<sup>7</sup> *Id.* at 14197-14198 ¶ 72.

<sup>8</sup> *Id.* at 14199-14200 ¶ 77.

<sup>9</sup> Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Third Memorandum Opinion and Order and Second Report and Order*, WT Docket No. 03-66, 21 FCC Rcd 5606, 5645 ¶ 72 (2006) (*BRS/EBS 3rd MO&O*). In the *3rd MO&O*, the Commission also granted WATCH TV’s request to opt-out of the transition of the 2.5 GHz band in Lima, Ohio. *Id.* at ¶ 84.

<sup>10</sup> Petition for Waiver at 3 (filed May 5, 2008) (Waiver Request). Oklahoma Western’s BRS stations include WLK382 (Channels E1-E4), WNTC664 (Channel H1), WNTC500 (Channel H2), and WNTD797 (Channel H3).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* Local schools receive the service for free. *Id.* Oklahoma Western suggests that since the transition of broadcast television to digital transmission, the over-the-air reception that may have existed may have been lost.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 3-4.

and is home to the Choctaw Indian Nation of Oklahoma.<sup>15</sup> Oklahoma Western argues that the emergency warnings and urgent weather alerts provided by the regional television stations carried on its system are particularly important because the area is prone to high wind and flood emergencies.<sup>16</sup>

5. Oklahoma Western's licenses expired on May 1, 2001. Oklahoma Western failed to file timely renewal applications for its licenses because it was under the erroneous impression that one of its consultants had prepared and filed renewal applications for all four of the Stations.<sup>17</sup> On December 30, 2002, Oklahoma Western filed late-filed renewal applications for its licenses. On December 31, 2002, Oklahoma Western filed a request for waiver of Sections 21.3, 21.11 and 21.44 of the Commission's Rules.<sup>18</sup> On November 19, 2004, the Broadband Division of the Bureau denied Oklahoma Western's request for reinstatement of its renewal applications and for waiver.<sup>19</sup>

6. On March 20, 2008, the Commission granted Oklahoma Western's application for review of the *Division Order* and reinstated its renewal applications.<sup>20</sup> The Commission also granted Oklahoma Western an extension until May 5, 2008 to file a request for waiver to opt out of the new band plan.<sup>21</sup> The renewal applications were granted on April 2, 2008.<sup>22</sup>

7. Oklahoma Western filed its Waiver Request on May 5, 2008.<sup>23</sup> Oklahoma Western wishes to expand its business to offer digital television channels and wireless internet services in its GSA.<sup>24</sup> It argues that it will be unable to carry out any expansion if it is forced to transition because it will only have a single mid-band channel after the transition.<sup>25</sup> Oklahoma Western contends that it "has spent a significant amount of time and money developing a viable wireless cable business."<sup>26</sup> It also argues that granting a waiver will have minimal impact on other licensees because the area is sparsely populated and the other incumbent licenses have center points at least 60 miles away from Oklahoma Western's transmitter site.<sup>27</sup>

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<sup>15</sup> *Id.* at 4.

<sup>16</sup> *Id.* See also Reply Comments of Oklahoma Western Telephone Company, Inc. (filed Jun. 12, 2009) (Reply) at 4-5.

<sup>17</sup> See Letter from David A. Irwin, Esq., counsel to Oklahoma Western Telephone Company, to Federal Communications Commission, Wireless Bureau Applications (filed Dec. 31, 2002) (Reinstatement and Waiver Requests) at 2.

<sup>18</sup> *Id.*

<sup>19</sup> Oklahoma Western Telephone Company, Inc., *Memorandum Opinion and Order*, 19 FCC Rcd 22780 (WTB BD 2004) (*Division Order*).

<sup>20</sup> See Oklahoma Western Telephone Company, *Memorandum Opinion and Order*, 23 FCC Rcd 5606 (2008).

<sup>21</sup> *Id.* at 5613 ¶ 20.

<sup>22</sup> See Wireless Telecommunications Bureau Market-Based Applications Action, Report No. 3969, *Public Notice* (WTB Apr. 9, 2008) at 1.

<sup>23</sup> Waiver Request.

<sup>24</sup> *Id.* at 4.

<sup>25</sup> *Id.* at 4, 6-7.

<sup>26</sup> *Id.* at 7.

<sup>27</sup> *Id.*

8. Oklahoma Western requests waiver of Sections 27.1230 *et. seq.* of the Commission's Rules,<sup>28</sup> and also requests that the Commission issue certain clarifications. Originally, Oklahoma Western requested that grant of its requested waiver specifically state that:

- Oklahoma Western will have permanent authority to operate pursuant to Section 27.1209 on the “pre-transition” BRS/EBS band plan set forth in Section 27.5(i)(1);
- Oklahoma Western shall participate in good faith in any transition planning process relating to any geographic area that overlaps its GSAs. In conjunction with any transition, Oklahoma Western will subsequently make such modifications to their facilities at the proponent's expense and as the proponent may reasonably request in an effort to reduce interference to licensees in other markets that are transitioning, provided that such modifications can be accomplished without cumulatively resulting in more than *de minimis* reduction in Oklahoma Western's ability to serve its then-existing subscribers;
- Every main, booster, and base station currently used in conjunction with Oklahoma Western's wireless cable system shall be permitted to continue operating under the maximum EIRP limits set forth for “pre-transition” operations in Section 27.50(h)(1)(i) and (ii);
- Any channel used for the transmission of analog video programming on Oklahoma Western's system shall be permitted to continue operating under the “pre-transition” emission limits for analog video programming channels set forth in Section 27.53(l)(1). Any channel used for the transmission of digital video programming on Oklahoma Western's system shall be permitted to continue operating under the “pre-transition” emission limits for digital video programming channels set forth in Section 27.53(l)(3). In addition, per Section 27.53(l)(5), Oklahoma Western shall be permitted to operate fixed, temporary fixed and mobile data stations deployed as of January 10, 2005, provided that those facilities are in compliance with the emission limits set forth in former Sections 21.908 and 74.936;<sup>29</sup>
- Consistent with Section 27.55(a)(4)(i), all of the channels in Oklahoma Western's system will be permitted to operate at any point along their respective GSA boundaries at the greater signal strength of 47 dBu or the strength authorized in their underlying licenses as of January 10, 2005;
- Sections 27.1220 (regarding 5.5 MHz wide channels in the LBS and UBS) and 27.1222 (regarding the establishment of guard bands around the MBS) shall not be applicable to Oklahoma Western; and
- Oklahoma Western shall not be subject to the height benchmarking obligations set forth in Section 27.1221.<sup>30</sup>

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<sup>28</sup> 47 C.F.R. §§ 27.1230 *et. seq.*

<sup>29</sup> In fact, the pertinent rule for emission limits for BRS stations is 47 C.F.R. § 27.53(m).

<sup>30</sup> Waiver Request at 8. *See also* Supplement to Petition for Waiver to Opt-Out of the BRS/EBS Transition Process (filed May 19, 2008).

9. On May 19, 2009, the Broadband Division/WTB released a Public Notice seeking comment on the Waiver Request.<sup>31</sup> On June 2, 2009, Clearwire Corporation (Clearwire) filed an opposition to and comments on the Waiver Request.<sup>32</sup> A subsidiary of Clearwire holds the BRS Basic Trading Area (BTA) license for the Paris, Texas BTA, within which Oklahoma Western's GSA is located.<sup>33</sup> Clearwire makes several arguments why it believes Oklahoma Western should not receive an opt-out waiver. First, Clearwire suggests that the Commission require Oklahoma Western to operate in the MBS using the seven available MBS channels.<sup>34</sup> Oklahoma Western responds that it is not eligible to hold licenses for the EBS MBS channels, that there is currently no mechanism for assigning unassigned EBS spectrum, and that it is uncertain whether its equipment could operate on seven adjacent channels without causing interference.<sup>35</sup> Next, Clearwire argues that the Waiver Request should be denied because it does not meet the specific criteria for opt-out waivers set forth by the Commission, in that it does not serve five percent of the households within its GSA and could offer its current programming over a single digitized channel.<sup>36</sup> Oklahoma Western responds that it would not be economically viable to operate on a single digital channel because the conversion would cost \$150,000 to \$200,000 and the system generates only \$1,800 a month in revenue.<sup>37</sup> Third, Clearwire objects to Oklahoma Western's attempt to seek a waiver for a future expansion of video service as contrary to precedent, in which the Bureau permitted continuation of operations without major service expansion.<sup>38</sup> Clearwire contends that granting a waiver "would introduce a new encumbrance to this service area and adversely impact the ability of consumers to benefit from advanced wireless broadband services."<sup>39</sup> Oklahoma Western responds that interference to potential Clearwire spectrum is unlikely because of the remote location of its system.<sup>40</sup> Oklahoma Western also cites a prior finding by the Bureau that granting all then-pending opt-out waivers would not result in meaningful harm to entities that wished to provide advanced broadband services.<sup>41</sup>

10. To the extent the Bureau believes a waiver is warranted, Clearwire asks that the waiver be limited to require Oklahoma Western to comply with most of the post-transition technical rules.<sup>42</sup> Specifically, Clearwire objects to allowing Oklahoma Western to: (1) operate with the maximum EIRP limits for pre-transition operations, (2) operate pursuant to pre-transition emission limits, (3) exceed the

<sup>31</sup> Wireless Telecommunications Bureau Seeks Comment on Request by Oklahoma Western Telephone Company for Waiver of the Requirement to Transition to the New BRS/EBS Band Plan, *Public Notice*, 24 FCC Rcd 5684 (WTB BD 2009).

<sup>32</sup> Opposition to and Comments on Request for Waiver, Clearwire Corporation (filed Jun. 2, 2009) (Clearwire Opposition).

<sup>33</sup> See License for B341 (NSAC, LLC).

<sup>34</sup> Clearwire Opposition at 3.

<sup>35</sup> Reply at 3-4.

<sup>36</sup> Clearwire Opposition at 3-5.

<sup>37</sup> Reply at 8.

<sup>38</sup> Clearwire Opposition at 4, 5-6, citing Central Texas Communications, Inc., *Memorandum Opinion and Order*, 24 FCC Rcd 4715, 4727 ¶ 28 (WTB 2009) (*Central Texas*); Dakota Central Telecommunications Cooperative, *et al.*, 24 FCC Rcd 4729, 4739-4740 ¶¶ 20-23 (WTB 2009) (*Dakota Central*); United Telephone Mutual Aid Corporation, *Memorandum Opinion and Order*, 24 FCC Rcd 4743, 4751 ¶ 15 (WTB 2009) (*United Telephone*).

<sup>39</sup> *Id.* at 6.

<sup>40</sup> Reply at 9-10.

<sup>41</sup> *Id.* at 10-11, citing *United Telephone*, 24 FCC Rcd at 4751-4752 ¶ 16.

<sup>42</sup> Clearwire Opposition at 8-9.

47 dB  $\mu$ V/m signal strength limit at the border of its GSA, and (4) not comply with Section 27.1221 of the Commission's Rules.<sup>43</sup> At the request of Bureau staff, Oklahoma Western provided an engineering statement providing additional information regarding its Waiver Request.<sup>44</sup> The Bryan Statement shows that for its current operations, Oklahoma Western does not require a waiver of the rules mentioned above that Clearwire objects to waiving.<sup>45</sup> Its current operations comply with the pre-transition emission limits contained in Section 27.53(m)(1) of the Commission's Rules.<sup>46</sup> Acknowledging Oklahoma Western's stated desire to convert to digital programming,<sup>47</sup> Clearwire contends that if Oklahoma Western does so, it should be required to transition to the new band plan and comply with the post-transition technical rules.<sup>48</sup>

11. On February 16, 2007, Fixed Wireless Holdings, LLC (FWH), a wholly-owned subsidiary of Clearwire, filed a transition initiation plan for the Paris, Texas BTA.<sup>49</sup> The initiation plan listed Oklahoma Western's licenses but indicated that the licenses had been cancelled.<sup>50</sup> On January 16, 2009, the Bureau's Broadband Division granted a request by FWH and extended the deadline to complete the transition until February 28, 2009.<sup>51</sup> On February 17, 2009, Clearwire requested an additional extension of time to complete the transition in the Paris, Texas BTA.<sup>52</sup> Clearwire states that until there is a ruling on Oklahoma Western's Waiver Request, it "cannot be sure what is required of it with respect to certain effected [sic] licensees and is unsure about what steps are necessary with respect to completion of the Transition."<sup>53</sup> The Clearwire Extension Request is unopposed.

### III. DISCUSSION

12. In the *BRS/EBS R&O*, the Commission found that it is in the public interest to consider waivers of the rules requiring licensees to transition to the new band plan and to comply with the new technical rules.<sup>54</sup> Specifically, the Commission found that it is in the public interest to consider waivers on a case-by-case basis for those operators or their affiliates that meet the definition of a multichannel video programming distributor in Section 522 of the Communications Act of 1934, as amended, and that provide MVPD service to five percent or more of the households within their respective geographic

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<sup>43</sup> *Id.* at 8.

<sup>44</sup> Engineering Statement by James Bryan, P.E. (filed Aug. 12, 2009) (Bryan Statement).

<sup>45</sup> *Id.* at 1, 3.

<sup>46</sup> *Id.* at 2.

<sup>47</sup> *Id.* at 3.

<sup>48</sup> See Letter from Nadja Sodos-Wallace, Regulatory Counsel and Assistant Secretary, Clearwire Corporation to John Schauble, Broadband Division, Wireless Telecommunications Bureau (filed Aug. 25, 2009) at 1-2.

<sup>49</sup> Letter from Terri B. Natoli, Vice President Regulatory Affairs and Public Policy, Clearwire Corporation to Office of the Secretary, Federal Communications Commission, WT Docket No. 06-136 (filed Feb. 17, 2009).

<sup>50</sup> *Id.* at Exhibit 1.

<sup>51</sup> See Letter to Nadja S. Sodos-Wallace, Regulatory Counsel, Assistant Secretary, Clearwire Corporation, *Letter*, 24 FCC Rcd 407 (WTB BD 2009).

<sup>52</sup> Letters from Nadja Sodos-Wallace, Regulatory Counsel and Assistant Secretary, Clearwire Corporation to Office of the Secretary, Federal Communications Commission, WT Docket No. 06-136 (filed Feb. 17, 2009) (Clearwire Extension Request).

<sup>53</sup> *Id.* at 1.

<sup>54</sup> *BRS/EBS R&O*, 19 FCC Rcd at 14199 ¶ 77.



service areas (GSAs).<sup>55</sup> The Commission further found that it is in the public interest to consider waivers for any BRS or EBS licensee that is co-located with any qualified MVPD licensee that elects to opt out.<sup>56</sup> In addition, the Commission found that it is in the public interest to consider waivers for those BRS licensees that have a viable business for high-powered operations, but who need more than seven digitized high-powered MBS channels to deliver their service to their customers.<sup>57</sup>

13. The Commission stated that, in reviewing requests to waive the rules, it would consider the actions taken by MVPD or BRS licensees to minimize the effect of interference on neighboring markets, as well as the licensee's explanation as to why it cannot work within the transition rules adopted by the Commission.<sup>58</sup> The Commission stated that waivers will be granted if it is shown that: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of the unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.<sup>59</sup>

14. Oklahoma Western has not attempted to demonstrate that it satisfies either of the specific bases for waiver established in the *BRS/EBS R&O*. Contrary to Clearwire's arguments, however, Oklahoma Western's failure to satisfy those criteria does not automatically render it ineligible to receive an opt-out waiver. As we have done with prior requests for opt-out waivers,<sup>60</sup> we will consider Oklahoma Western's request under the general waiver standard contained in Section 1.925 of the Commission's Rules.<sup>61</sup>

15. Initially, we reject Clearwire's suggestion that Oklahoma Western's licenses be moved to the MBS. As Oklahoma Western has pointed out, most of the vacant MBS channels are allotted to EBS. The primary purpose of EBS is "to further the educational mission of accredited public and private schools, colleges and universities providing a formal educational and cultural development to enrolled students."<sup>62</sup> We do not believe that allowing Oklahoma Western to be directly licensed on all of the EBS MBS channels would be consistent with the underlying purposes of EBS.

16. Turning to the Waiver Request, we find that, in view of its unusual circumstances, requiring Oklahoma Western to transition to the new band plan and technical rules would be inequitable, unduly burdensome, and contrary to the public interest. First, Oklahoma Western has shown that it is a viable business in the Clayton, Oklahoma GSA. Oklahoma Western has provided service since 1990 and is providing broadcast television service to people who otherwise would not receive such service. Moreover, this service provides vital information – including emergency warnings and urgent weather alerts – to otherwise unserved communities that are frequently subject to extreme weather conditions.

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<sup>55</sup> *Id.* This calculation is made in accordance with the requirements of 47 C.F.R. § 76.905(c).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*, 19 FCC Rcd at 14199-14200 ¶ 77, 47 C.F.R. § 1.925(b)(3).

<sup>60</sup> See *Central Texas*, 24 FCC Rcd at 4724 ¶ 18; *Dakota Central*, 24 FCC Rcd at 4738-4739 ¶ 17; *United Telephone*, 24 FCC Rcd at 4749 ¶ 9.

<sup>61</sup> 47 C.F.R. § 1.925.

<sup>62</sup> 47 C.F.R. § 27.1203(a).

17. We also conclude that it is not economically feasible for Oklahoma Western to transition to the new band plan and technical rules. While Oklahoma Western's representations regarding the cost and technical feasibility of transitioning to the MBS on one channel are not substantiated with an engineering affidavit, it is readily apparent that the \$1,800 a month Oklahoma Western receives in subscriber revenue is insufficient to fund the significant equipment changes that would be needed to digitize Oklahoma Western's existing service.

18. Oklahoma Western has shown that it is in the public interest to grant its waiver request. The emergency information that can be provided by the broadcast stations Oklahoma Western is important, particularly given the area's vulnerability to bad weather. Clearwire has expressed concern that granting Oklahoma Western an opt-out waiver would result in a "new encumbrance" on its efforts to provide advanced wireless broadband services in nearby communities.<sup>63</sup> The record shows, however, that Oklahoma Western can maintain its service without obtaining waivers of the technical rules that could cause interference to operations in adjacent areas. Specifically, the Bryan Statement shows that Oklahoma Western does not need waivers of Sections 27.50(h), 27.55(a)(4), or 27.1221 of the Commission's Rules in order to maintain its existing operations.<sup>64</sup> Without waivers of those rules, Oklahoma Western can not cause any more interference to Clearwire or other licensees in adjacent areas than if it transitioned to the new band plan. We do grant Oklahoma Western a waiver to operate pursuant to the pre-transition analog emission limits contained in Section 27.53(m)(1) of the Commission's Rules because such a waiver is necessary for Oklahoma Western to maintain its existing operations and because no licensee has indicated that it will be operating on adjacent channels in the same area as Oklahoma Western.

19. We decline to grant Oklahoma Western's request for an open-ended waiver to allow it to modify its service in the future to offer digital video service, finding that such a request is not necessary, has not been supported and could adversely affect neighboring licensees. Oklahoma Western has not provided any description of a contemplated digital system that could be used to evaluate potential harm to adjacent licensees. As noted above, Oklahoma Western's request for waiver of several technical rules was unnecessary with respect to its existing system because it complied with those rules. With one exception, Oklahoma Western could convert its existing system to digital without any additional waivers. The one exception relates to emission limits. Pursuant to the waiver we grant herein, if Oklahoma Western uses its system for transmission of digital video programming, as it indicates it wishes to do, it is permitted to operate pursuant to the pre-transition emission limits contained in Section 27.53(m)(3) of the Commission's Rules. We acknowledge Oklahoma Western's concern that its existing operations not be frozen, and clarify that if Oklahoma Western wishes to upgrade its system, it may operate up to the limits contained in the Commission's post-transition technical rules.

20. With respect to potential aggregate harm resulting from the collective grant of pending opt-out waiver requests, we conclude that our grant of opt-out waivers will not, separately or in the aggregate, result in any meaningful harm to Clearwire, or to other entities that wish to provide advanced broadband services in the 2.5 GHz band. With our action here today, we have granted a total of seven MVPD opt-out waiver requests.<sup>65</sup> Those systems collectively serve fewer than 40,000 subscribers and

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<sup>63</sup> Clearwire Opposition at 6.

<sup>64</sup> Bryan Statement.

<sup>65</sup> See *BRS/EBS 3<sup>rd</sup> MO&O*, 21 FCC Rcd at 5650 ¶ 84 (granting WATCH TV's request to opt-out of the transition for its MVPD system in Lima, Ohio); *Antilles Wireless, LLC, Memorandum Opinion and Order*, 22 FCC Rcd 9348 (WTB 2007), *recon. denied, Order on Reconsideration*, 24 FCC Rcd 4696 (WTB 2009) (granting of opt-out request filed by Antilles Wireless, LLC d/b/a USA Digital (USA Digital) for its MVPD system in Billings, MT); *C & W Enterprises, Inc., Memorandum Opinion and Order*, 24 FCC Rcd 4705 (WTB 2009) (granting request by C & W

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cover only approximately 76 out of 5,289 active BRS and EBS licenses. Given the largely rural locations for which waivers have been sought, and our conclusions that the waivers we have granted to date will have relatively minimal impact on nearby licensees, we believe our decisions will not adversely impact licensees who wish to use this band for low-power, cellularized broadband services, even if all of the waivers were ultimately granted. If the licensees requesting opt-out waivers had chosen instead to provide low-power cellularized services, nearby licensees would still have been required to protect the service areas of the opting-out licensees. Finally, since the deadline for filing opt-out waiver requests has expired,<sup>66</sup> licensees who wish to offer low-power, cellularized broadband services can now plan with certainty knowing that no other such requests will be entertained.

21. Therefore, we grant Oklahoma Western's Waiver Request with the following conditions:

- Oklahoma Western will have permanent authority to operate within the Clayton GSA pursuant to Section 27.1209 on the "pre-transition" BRS/EBS band plan set forth in Section 27.5(i)(1);
- Oklahoma Western must participate in good faith in any transition planning process relating to any geographic area that overlaps their GSAs. In conjunction with any transition, Oklahoma Western will subsequently make such modifications to its facilities at the proponent's expense (unless otherwise agreed) as the proponent may reasonably request in an effort to reduce interference to licensees in other markets that are transitioning, provided that such modifications can be accomplished without cumulatively resulting in more than a *de minimis* reduction in Oklahoma Western's ability to serve its then-existing subscribers;
- Any channel used for the transmission of analog video programming on Oklahoma Western's system shall be permitted to continue operating under the "pre-transition" emission limits for analog video programming channels set forth in Section 27.53(m)(1). If Oklahoma Western converts its system to digital, any channel used for the transmission of digital video programming on Oklahoma Western's system shall be permitted to continue operating under the "pre-transition" emission limits for digital video programming channels set forth in Section 27.53(m)(3); and
- Sections 27.1220 (regarding the 5.5 MHz wide channels in the LBS and UBS) and 27.1222 of the Commission's Rules (regarding the establishment of guardbands around the MBS) shall not be applicable to Oklahoma Western.

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Enterprises, Inc. (C&W) for a temporary waiver to opt out of the transition for its MVPD system in San Angelo, TX); Central Texas Communications, Inc., *Memorandum Opinion and Order*, 24 FCC Rcd 4715 (WTB 2009) (granting request by Central Texas Communications, Inc. (Central Texas) for a permanent waiver to opt out of the transition for its MVPD systems in Goldthwaite, Lohn, and San Saba, Texas); Dakota Central Telecommunications Cooperative, *et al.*, *Memorandum Opinion and Order*, 24 FCC Rcd 4729 (WTB 2009) (partially granting request by Dakota Central Telecommunications Cooperative (Dakota Central) for a permanent waiver to opt out of the transition for its MVPD system in Brush Hill, ND); United Telephone Mutual Aid Corporation, *Memorandum Opinion and Order*, 24 FCC Rcd 4743 (WTB 2009) (granting request by United Telephone Mutual Aid Corporation (United) for a permanent waiver to opt out of the transition for its MVPD systems in Milton and Egeland, North Dakota); Northwest Communications Cooperative, *Memorandum Opinion and Order*, 24 FCC Rcd 12954 (WTB 2009) (granting request by Northwest Communications Cooperative for a permanent waiver to opt out of the transition for its MVPD system in Bowbells, North Dakota);. While a waiver was also granted to WHTV Broadcasting Corp. d/b/a/ Digital TV One, that entity has turned in the waiver for cancellation. See Return of Waiver for Cancellation, WHTV Broadcasting Corp. d/b/a/ Digital TV One (filed Aug. 19, 2009).

<sup>66</sup> See 47 C.F.R. § 27.1231(g) (establishing April 30, 2007 deadline).

22. Because we have given Oklahoma Western authority to opt out of the transition, Clearwire may not unilaterally transition the licenses that constitute Oklahoma Western's system to the new band plan. Because the plans Clearwire filed include additional licenses, it is possible that Clearwire may wish to transition the other licenses without transitioning Oklahoma Western's system. On the other hand, if Clearwire is unable to transition the Oklahoma Western systems, it may no longer wish to transition the remainder of the Paris, Texas BTA. We will allow Clearwire to choose either option. Within 30 days of the release of this *Memorandum Opinion and Order*, Clearwire shall file an election stating how it wishes to proceed with respect to the Paris, Texas BTA. If Clearwire decides not to transition other licenses in those markets, those licensees shall have at least 30 days after Clearwire files its election to file self-transition notifications. Furthermore, if Clearwire decides to transition the other stations in the Paris, Texas BTA, we grant its request for additional time to complete the transition for a period of six months from the date of release of this order (until November XX, 2010).

#### IV. CONCLUSION AND ORDERING CLAUSES

23. Oklahoma Western has justified a waiver by demonstrating that it has a viable business for analog video operations, that it is economically infeasible for it to transition to the new band plan and technical rules, that it will not harm its neighbors by maintaining current operations, and that it is in the public interest to continue to provide service to its customers in the Clayton, Oklahoma GSA. The Bureau also concludes that requiring Oklahoma Western to transition to the new band plan would be inequitable, unduly burdensome and contrary to the public interest because it would be required to discontinue its existing service to customers.

24. ACCORDINGLY, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 154(i), and Sections 1.925 and 27.1231(g) of the Commission's Rules, 47 C.F.R. §§ 1.925, 27.1231(g), that the Request for Waiver filed by Oklahoma Western Telephone Corporation on May 5, 2008 IS GRANTED to the extent indicated herein and is otherwise DENIED.

25. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 154(i), and Section 27.1231 of the Commission's Rules, 47 C.F.R. § 27.1231, that within 30 days of the release of this *Memorandum Opinion and Order*, Fixed Wireless Holdings, LLC shall file an election in WT Docket No. 06-136 informing the Commission whether it wishes to continue to transition the remaining licenses in the Paris, Texas Basic Trading Area (BTA 341).

26. IT IS FURTHER ORDERED, pursuant to Sections 1.46 and 27.1232(b)(1)(vi) of the Commission's Rules, 47 C.F.R. §§ 1.46, 27.1232(b)(1)(vi), that if Fixed Wireless Holdings, LLC elects to transition the other stations in the Paris, Texas BTA, the Request for Extension of Time filed by Fixed Wireless Holdings, LLC on February 17, 2009 IS GRANTED, and the time for completing the transition in the Paris, Texas Basic Trading Area (BTA 341) IS EXTENDED TO November XX, 2010.

27. These actions are taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Jane E. Jackson  
Associate Chief, Wireless Telecommunications Bureau